

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Request for Review by |) | CC Docket Nos. 96-45 and 97-21 |
| Unicom, Inc. of Decision of |) | |
| Universal Service Administrator |) | |
| |) | |

To: The Commission

**YUKON-KUSKOKWIM HEALTH CORPORATION'S OPPOSITION TO
PETITION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR REVIEW
OR, IN THE ALTERNATIVE, COMMENTS ON SUPPLEMENT**

The Commission should reject this latest attempt by a disappointed bidder on a rural health care telecommunications project to turn the FCC into the forum of choice for contract bidding disputes and interpretations of Indian preference law. The Yukon-Kuskokwim Health Corporation ("YKHC"), by its attorneys, files this Opposition to the Petition for Leave to File Supplement to Petition for Review ("Petition to Supplement")¹ filed by Unicom, Inc. ("Unicom") in which Unicom seeks to submit for Commission consideration a memorandum on

¹ *In re Request for Review by Unicom, Inc. of Decision of Universal Service Administrator, Petition for Leave to File Supplement to Petition for Review*, CC Docket Nos. 96-45 & 97-21 (April 22, 2002). Unicom seeks review of a decision by USAC that completely rejected all of Unicom's claims against YKHC. Specifically, USAC rejected the allegation that YKHC had failed to comply with the Commission's competitive bidding requirements in contracting with General Communications, Inc. for telecommunications services eligible for universal service support. After filing its Petition for Review of USAC's decision, Unicom has filed a number of extraneous supplements. *See In re Request for Review by Unicom, Inc. of Decision of Universal Service Administrator, Petition for Review*, CC Docket Nos. 96-45 & 97-21 (Oct. 9, 2001); Supplement to Petition for Review (Oct. 12, 2001); Supplement to Petition for Review (Nov. 2, 2001).

the scope of the Indian Self-Determination and Education Assistance Act (“ISDEAA”).² YKHC opposes Unicom’s Petition to Supplement because the memorandum prepared by the Office of Legal Counsel, U.S. Department of Justice, (the “Memorandum”) that Unicom seeks to submit holds no relevance for the Communications Act question that is before the Commission in the above-captioned matter. If the Commission decides to grant Unicom’s Petition to Supplement, however, the Commission will see that the Memorandum according to its own terms has no bearing to the instant matter because unlike the examples addressed by the Memorandum as to which the ISDEAA would apply, neither the rural health care provisions of the Telecommunications Act of 1996 nor the Commission’s implementing regulations nor the contract at issue are intended to “benefit Indians because of their status as Indians.”³

I. UNICOM’S PETITION SHOULD BE DENIED BECAUSE THE FILING IS NOT RELEVANT.

Unicom’s Petition to Supplement should be denied and dismissed with prejudice because it seeks to submit material that is not relevant to any question that the Commission has legal authority to address. The Administrative Procedure Act and sound jurisprudence require the Commission to not grant leave to parties seeking to submit information that addresses a legal question far outside the Commission’s jurisdiction.⁴

² 25 U.S.C. § 540e(b).

³ Memorandum at 6. To avoid confusion, this filing follows the convention of the Memorandum and refers to “Native Americans” as “Indians.” *See* Memorandum at 1 n.1 (explaining that because the relevant statutes use “Indian,” the Memorandum uses that term as well).

⁴ Documentary evidence addressing a legal question that is outside the Commission’s jurisdiction is irrelevant and immaterial, and, under the Commission’s rules, as well as the Administrative Procedure Act, irrelevant or immaterial evidence is inadmissible. *See* 47 C.F.R. § 1.351 (stating that except as otherwise provided, “the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern formal hearings”); FED. R. EVID. 402 (“Evidence which is not relevant is not admissible.”); *see also* Administrative Procedure Act, 5 U.S.C. § 556(d) (stating that under the rule of evidence applicable to agency (continued...))

Unicom asserts that the Memorandum bears on Unicom's allegation that in awarding the contract at issue, YKHC failed to comply with "other procurement requirements"⁵ by not providing an Indian preference pursuant to the ISDEAA.⁶ However, as the Universal Service Administrative Company ("USAC") concluded in its decision below, the Commission is not the appropriate forum for disappointed bidders such as Unicom to litigate claims regarding compliance with state, local, or other procurement requirements.⁷ The only reason for the Commission to grant Unicom's Petition to Supplement would be to explore and rule upon the full scope of the ISDEAA. But enforcing the ISDEAA is far beyond the scope of the Commission's jurisdiction, and no provision in the Communications Act of 1934 or the specific rural health care provisions of the Telecommunications Act of 1996 stretch the Commission's jurisdiction in that direction. The better course is to reject this Petition and adopt the conclusion that USAC gave below: If Unicom believes that it has a valid claim under the ISDEAA or state procurement law, it is free to "pursue any alternative legal remedies that are available to it."⁸

adjudications "the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence").

⁵ Section 54.603 of the Commission's rules provides that rural health care providers seeking to receive universal service support must comply with "applicable state, local, or other procurement requirements." 47 C.F.R. § 54.603. YKHC has fully demonstrated that it complied with all applicable state, local, or other procurement requirements in its prior filings to USAC and in its Opposition to Petition for Review in the above-captioned matter. *See* Letter from Lloyd Benton Miller and Gerard J. Waldron, Attorneys for YKHC, to Mel Blackwell, Vice President, USAC (Jan. 26, 2001) ("YKHC January Letter") at 8-12; Letter from Lloyd Benton Miller and Gerard J. Waldron, Attorneys for YKHC, to Mel Blackwell, Vice President, USAC (Mar. 8, 2001) at 1-2; *In re Request for Review by Unicom, Inc. of Decision of Universal Service Administrator, Opposition to Petition for Review*, CC Docket Nos. 96-45 and 97-21 (Nov. 19, 2001) ("Opposition to Petition for Review") at 13-15.

⁶ *See* Petition to Supplement at 1-2.

⁷ Letter from D. Scott Barash, Vice President & General Counsel, USAC, to William K. Keane et al. (Sept. 6, 2001) ("USAC Letter") at 8 ("RHCD lacks the ability or authority to make an independent assessment of whether a health care provider has in fact complied with any additional and applicable state, local or other procurement requirements.") (internal quotation marks omitted).

⁸ USAC Letter at 8.

Because the Commission is not the appropriate forum to address the legal issues raised in the Memorandum, the Petition to Supplement should be denied and dismissed with prejudice.

II. ALTERNATIVELY, THE MEMORANDUM IS INAPPOSITE BECAUSE NEITHER THE RURAL HEALTH CARE PROVISIONS OF THE TELECOMMUNICATIONS ACT OF 1996 NOR THE CONTRACT AT ISSUE ARE INTENDED TO BENEFIT INDIANS BECAUSE OF THEIR STATUS AS INDIANS.

If the Commission grants Unicom's Petition to Supplement, the Commission should find the Memorandum as having no bearing on the disposition of the above-captioned matter because neither the rural health care provisions of the Telecommunications Act of 1996, nor the Commission's implementing regulations, nor the contract at issue are intended "for the benefit of Indians because of their status as Indians."⁹ YKHC does not dispute that, if one is interested in such an inquiry, the Memorandum provides a well-reasoned analysis of the scope of section 7(b) of the ISDEAA within the context of Department of Agriculture programs. However, Unicom grossly misinterprets and mischaracterizes the Memorandum's conclusion. Specifically, Unicom states that the Memorandum's conclusion is that Indian preferences are to be awarded "even in instances where a particular Act . . . or its implementing regulations do not specifically identify Indians as the intended beneficiaries."¹⁰ However, in making this statement, Unicom omits a crucial element of the Memorandum's conclusion – that Indian preferences are to applied to such statutes "*so long as the particular grants or contracts are for the benefit of Indians because of their status as Indians.*"¹¹ Unicom obviously omits this key language because it is fatal to its claim that the Memorandum helps its case.

⁹ Memorandum at 6.

¹⁰ Petition to Supplement at 1.

¹¹ Memorandum at 6 (emphasis added).

To review, the Memorandum considers whether section 7(b) of the ISDEAA applies to grants or contracts made pursuant to the following four types of statutes:

- (1) statutes that expressly provide that Indians or Indian organizations are the sole eligible recipients of federal assistance;
- (2) statutes that expressly provide that Indians or Indian organizations are one among several categories of eligible recipients or expressly provide that the financial assistance is for the benefit of Indians;
- (3) statutes that do not expressly provide that Indians or Indian organizations are among the eligible recipients but the implementing regulations do expressly identify Indians or Indian organizations as eligible recipients; and
- (4) statutes that do not expressly provide and do not have implementing regulations that expressly provide that Indians or Indian organizations are among the eligible recipients, and do not expressly provide and do not have implementing regulations that expressly provide that Indians are intended beneficiaries, but support activities that will in fact principally benefit Indians.¹²

As to the first and second categories, the Memorandum concludes that section 7(b) of the ISDEAA applies to such statutes. As to the third and fourth categories, the Memorandum – while noting that the issue “is not free from doubt”¹³ – ultimately concludes that such statutes are covered by section 7(b) but only if “the particular grants or contracts are for the benefit of Indians because of their status as Indians.”¹⁴ In elucidating the phrase “for the benefit of Indians because of their status as Indians,” the Memorandum explains that the phrase captures the notion that the contract be “specifically for the benefit of Indians . . . in addition to any *incidental benefits* that might otherwise accrue to the general public.”¹⁵ The Memorandum adds that “the

¹² *Id.* at 5.

¹³ *Id.* at 6.

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 10-11 (emphasis added).

contract must not just benefit Indians incidentally. It must be intended to benefit Indians at least in part because of their Indian identity.”¹⁶

Considering the four statutory categories here, the rural health care provisions of the Telecommunications Act of 1996 and the Commission’s implementing regulations, pursuant to which the contract at issue was awarded, do not fall within any of the four above-referenced categories. The first, second, and third categories plainly are inapplicable because neither the statutory or regulatory rural health care provisions state that Indians or Indian organizations are the sole recipients of federal assistance, or that Indians or Indian organizations are among the eligible recipients, or that financial assistance is for the benefit of Indians.¹⁷ Even Unicom does not seem to suggest that the first, second, or third categories apply.

Unicom seems to rest its claim of relevance entirely on the fourth category. However, according to the terms set forth in the Memorandum, the fourth category also is inapplicable because neither the contract at issue nor the statutory or regulatory rural health care provisions can be characterized as principally benefiting Indians. The Memorandum carefully distinguishes between intended and incidental benefits: “the contract must not just benefit Indians incidentally. It must be intended to benefit Indians at least in part because of their Indian identity.”¹⁸ Unicom’s claim that section 7(b) applies to the instant case fails because the statutory and regulatory rural health care provisions and the contract at issue here are not intended principally to benefit Indians. Rather, they are intended to principally benefit “rural

¹⁶ *Id.* at 11.

¹⁷ See 47 U.S.C. § 254(h); 47 C.F.R. § 54.601 et seq.; see also YKHC January Letter at 12 (explaining that “Indians” or “tribes” are not mentioned in the Telecommunications Act of 1996 or in the rural health care provisions thereof).

¹⁸ Memorandum at 11.

health care providers” and “persons who reside in rural areas.”¹⁹ As the Conference Report to the Telecommunications Act of 1996 states in describing the purposes of the rural health care provisions:

New subsection (h) of section 254 is intended to ensure that health care providers for rural areas, elementary and secondary school classrooms, and libraries have affordable access to modern telecommunications services that will enable them to provide medical and educational services to all parts of the Nation. The ability of K-12 classrooms, libraries and rural health care providers to obtain access to advanced telecommunications services is critical to ensuring that these services are available on a universal basis. The provisions of subsection (h) will help open new worlds of knowledge, learning and education to all Americans – rich and poor, rural and urban.²⁰

Thus, the beneficiaries of the rural health care provisions and contracts pursuant thereto – health care providers and persons living in rural areas – receive such benefits because they provide health care services in rural areas or live in rural areas. To the extent that any Indians may benefit as a result of the rural health care provisions or the contract at issue, those benefits stem from where they live – in rural areas – and *not* to their status as Indians.

Indeed, all of the examples cited in the Memorandum of contracts benefiting Indians support this conclusion. Specifically, the Memorandum cites Federal Extension Service grants pursuant to the Smith-Lever Act that “have gone to support educational programs at tribal colleges and popular educational efforts on reservations aimed at promoting safe handling of food.”²¹ The Memorandum also cites grants pursuant to the Food Stamp Act “to organizations promoting agricultural production on reservations.”²² These examples illustrate grants that

¹⁹ See 47 U.S.C. § 254(h).

²⁰ H.R. CONF. REP. NO. 104-458, at 132 (1996). See also 47 C.F.R. 54.601-.625 (containing rules governing “rural health care providers”).

²¹ Memorandum at 5.

²² *Id.* at 5-6.

principally benefit Indians because of their status as Indians. In each example, the grant gave direct support to Indians because of their membership in a tribe or because they live on Indian reservations. By contrast, the contract at issue here demonstrates no such direct support of Indians, Indian tribes, or Indian reservations. Instead, the clear intent of the program and the grant is to benefit rural health care providers and persons living in rural areas, and any beneficial effect that may accrue to Indians per se is incidental.²³

* * * * *

Accordingly, for the reasons stated above, the Petition to Supplement should be denied and dismissed with prejudice. In the alternative, should the Commission decide to grant the Petition to Supplement, the Commission should find the Memorandum not relevant to the question pending in the above-captioned matter.

²³ The DOJ Memorandum is quite clear on this point: “[T]he contract must not just benefit Indians incidentally. It must be intended to benefit Indians at least in part because of their Indian identity.” *Id.* at 11.

Respectfully submitted,

YUKON-KUSKOKWIM HEALTH CORPORATION

BY:

A handwritten signature in black ink, appearing to read "Gerard J. Waldron", written over a horizontal line.

Gerard J. Waldron

Faith D. Kasparian

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CERTIFICATE OF SERVICE

I, Faith D. Kasparian, do hereby certify that a copy of YUKON-KUSKOKWIM HEALTH CORPORATION'S OPPOSITION TO PETITION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR REVIEW OR, IN THE ALTERNATIVE, COMMENTS ON SUPPLEMENT was hand-delivered this 6th day of May, 2002, to:

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